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**BY FAX 202-208-3333 AND REGULAR MAIL**

Ms. Mary W. Dove  
Commission Secretary  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

Re: Draft Advisory Opinion 2003-17

Dear Ms. Dove:

We have received and reviewed Draft Advisory Opinion 2003-17 and submit the following comments for consideration by the Commission and staff.

**PRELIMINARY STATEMENT**

For the reasons that follow, James W. Treffinger respectfully requests that the Advisory Opinion be amended to authorize the use of campaign funds to pay for legal expenses incurred by Mr. Treffinger against allegations arising directly out of his 2000 and 2002 campaigns for U.S. Senate. The Draft Advisory Opinion does not properly apply the "irrespective test" consistently used by the Commission in prior advisory opinions. Specifically, the allegations against Mr. Treffinger would not have been leveled "irrespective" of whether he conducted two federal election campaigns. In fact, all but one of the 19 allegations are possible only because he was a federal candidate.

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## DISCUSSION

The draft advisory opinion correctly states that the "irrespective test" governs the potential use of Treffinger for Senate campaign funds to pay for legal expenses incurred as a result of United States v. Treffinger, Crim. No. 02-495 (D. N.J.) (JWB). (Draft Advisory Opinion 2003-17 at 6) Consequently, campaign funds would not be converted to personal use if they were used to pay for legal expenses incurred "in defense of allegations that relate directly to campaign activities." (Draft Advisory Opinion 2003-17 at 7) This analytical framework is consistent with prior advisory opinions:

[T]he use of campaign funds to pay legal expenses that would not exist absent [a federal] candidacy . . . would be permissible. . . .  
[A]ny legal expense that relates directly to allegations arising from campaign . . . activity would qualify for 100% payment with campaign funds.

Advisory Opinion 1998-1, 1998 WL 108618 \*3-4 (F.E.C.); see also Advisory Opinion 1997-12, 1997 WL 529598 \*4 (F.E.C.) ("the use of campaign funds to pay legal expenses that would not exist absent his candidacy . . . would be permissible.").

The Commission's interpretation of the rule, as set forth in its prior advisory opinions, is clear and unambiguous. Whether the legal fees sought relate to the defense of a civil action (Advisory Opinion 1995-23) or an investigation by the House Ethics Committee (Advisory Opinion 1998-1) or media allegations (Advisory Opinion 1997-12), the test is the same: "[A]ny legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds." Advisory Opinion 1997-12; see also Advisory Opinion 1998-1 (same).

The analysis is also straightforward and unambiguous. The Commission simply scrutinizes the allegations that lead to the legal expenses. If the allegations relate to campaign activity (see Advisory Opinion 1995-23, Advisory Opinion 1998-1), as they did in this case—or even if the allegations are personal but impact on the federal campaign (see Advisory Opinion 1997-12)—then any costs associated with defending the allegations are clearly permissible. Though the opinions cited all involve allegations of malfeasance by the candidate/officeholder, there is no consideration in any of the opinions of the underlying "essence" or nature of allegations, because such a consideration is not relevant.

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The sole issue presented is whether the allegations in the Indictment would exist "irrespective" of Mr. Treffinger's two federal election campaigns for U.S. Senate in 2000 and 2002. Because the answer is a resolute "no," Mr. Treffinger should be permitted to use campaign funds to pay legal expenses.

The draft advisory opinion states:

[T]he Commission concludes that the allegations of the Indictment do not relate directly to campaign activity . . . While some of the benefit of the "scheme and artifice" alleged in the indictment may have benefitted, or may have been intended to benefit, his campaign, the primary wrong alleged in the indictment is the defrauding of a non-federal polity (i.e., the county and its citizens).

(Draft Advisory Opinion 2003-17 at 7-8)

A review of previous advisory opinions reveals that never before has the Commission qualified the "irrespective test" with an inquiry into the "essence" of the primary wrong alleged. Rather, the sole relevant inquiry is whether the allegations of wrongdoing would exist irrespective of the candidate's campaign status.

In Advisory Opinion 1996-24, the allegations of wrongdoing included making false statements in voter pamphlets (which can be characterized as fraud on the voting public), and other personal wrongdoing to which the candidate was compelled to publicly respond as a result of his campaign. The Commission wrote that, "[s]ince the alleged false statements were made in voter pamphlets . . . in the course of his campaign . . . he may use campaign funds for any expenses incurred in the course of this investigation." Advisory Opinion 1996-24, 1996 WL 419823 \*4 (F.E.C.). The sole inquiry was whether the allegations related to conduct during the course of the candidacy, not the precise nature of the allegations.

In Advisory Opinion 1998-1, Congressman Hilliard was the subject of an investigation by the House Ethics Committee into allegations that Mr. Hilliard and/or his campaign essentially subsidized his personal businesses and charities with campaign monies; that he failed to make full required disclosures of his business interests; that he used his campaign to pay for services from an employee to his personal businesses and his district office business; allegations of contributions from an undisclosed source; and other improper activities by Mr. Hilliard and his personal businesses and charities. Advisory Opinion 1998-1, 1998 WL 108618 \*3 (F.E.C.). The Commission wrote:

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[T]he allegations described . . . entail improper funding practices or other conduct by . . . Mr. Hilliard . . . As such, they arise directly out of Mr. Hilliard's status and conduct as a Federal candidate . . . and the expenses of responding to such allegations would not arise irrespective of such status and conduct. Therefore, the legal expenses for dealing with, responding to, the press as to these allegations would be 100% payable by the Committee.

Id. at \*4. The sole inquiry was whether the allegations related to conduct during the course of the candidacy, not the precise nature of the allegations.

In Advisory Opinion 1997-12, the Commission wrote that "the legal expenses relating to allegations that your vote in Congress was part of an impermissible plan to establish a business venture in which you held a secret interest can be paid 100% with campaign funds." Advisory Opinion 1997-12m 1997 WL 529598 \*5 (F.E.C.). Such activity, if true, would clearly constitute a violation of the duties of office and of the public trust. The sole inquiry by the Commission, however, was whether the allegations related to conduct during the course of the candidacy, not the precise nature of the allegations.

Thus, there is no basis in either the regulations or previous advisory opinions for the Commission to consider the underlying "essence of the allegations," (Draft Advisory Opinion 2003-17 at 7) whether they involve breaches of public trust or public fraud, separate and apart from the inquiry into whether the allegations would exist irrespective of the candidacy.

### THE TREFFINGER INDICTMENT

As our initial written request for an advisory opinion explained, a review of the Indictment establishes that 19 of 20 of the counts relate directly to Mr. Treffinger's 2000 and 2002 campaign. Put another way, the factual predicates for 19 of the 20 counts would not have occurred if Mr. Treffinger were not a federal candidate and the allegations made in 19 of the 20 counts would not have been investigated and charged if Mr. Treffinger were not a federal candidate. Thus, Mr. Treffinger's legal expenses "would not exist absent his candidacy." Advisory Opinion 1998-1, 1998 WL 108618 \*3 (F.E.C.). Mr. Treffinger's status as a county elected official, while relevant, is neither the sole nor the predominant basis for the indictment. Indeed, if Mr. Treffinger had only been a county elected official and not simultaneously a federal candidate, then all but one of the charges in the indictment would have been factually and legally impossible. In other words, the allegations in the indictment would not have been made "irrespective" of Mr. Treffinger's federal candidacy.

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Counts 1 through 5 involve an alleged scheme to obtain campaign contributions for Mr. Treffinger's 2000 U.S. Senate campaign. The alleged awarding of county contracts in exchange for the campaign contributions only occurred because the contractor made the federal campaign contributions. Contrary to the Draft Advisory Opinion, there was no separate "scheme and artifice" to defraud Essex County that stood apart from the campaign, i.e., "irrespective" of the campaign. Also, Count 4 specifically alleges that Mr. Treffinger caused the filing of a false campaign disclosure report to the FEC, an allegation that exclusively relates to Mr. Treffinger's status as a federal candidate. In short, if there had been no 2000 U.S. Senate campaign, then there would be no Counts 1 through 5.<sup>1</sup>

Count 6 alleges that Mr. Treffinger extorted campaign contributions for his 2000 U.S. Senate campaign by allegedly awarding county contracts in exchange for the senate campaign contributions. Once again, the alleged extortion only occurred to force the "victim" contractor to make the federal campaign contributions. If there had been no 2000 U.S. Senate campaign, then there would be no Count 6.<sup>2</sup>

Count 7 alleges that Mr. Treffinger conspired with others to mislead law enforcement investigating the conduct alleged in Counts 1-6. Given that Counts 1-6 arise directly from Mr. Treffinger's 2000 U.S. Senate campaign, the alleged conspiracy to cover up those campaign-related activities only existed because the campaign existed. If there had been no 2000 U.S. Senate campaign, then there would be no Count 7.<sup>3</sup>

Counts 8 through 10 allege that Mr. Treffinger directed others to mislead law enforcement investigating the conduct alleged in Counts 1-6. Given that Counts 1-6 arise directly from Mr. Treffinger's 2000 U.S. Senate campaign, the alleged cover up of those campaign-related activities only took place because the campaign existed. If there had been no 2000 U.S. Senate campaign, then there would be no Counts 8 through 10.<sup>4</sup>

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<sup>1</sup>The Government has agreed to dismiss Counts 1-5 after sentencing.

<sup>2</sup>The Government has agreed to dismiss Count 6 after sentencing.

<sup>3</sup>On May 30, 2003, Mr. Treffinger pleaded guilty to Count 7 and is scheduled to be sentenced on September 10, 2003.

<sup>4</sup>The Government has agreed to dismiss Counts 8 through 10 after sentencing.

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Count 11 alleges that Mr. Treffinger extorted campaign contributions for his 2002 U.S. Senate campaign by allegedly withholding payment due to a county contractor in exchange for a senate campaign contribution. The alleged extortion only occurred to force the "victim" contractor to make a federal campaign contribution. If there had been no 2002 U.S. Senate campaign, then there would be no Count 11.<sup>5</sup>

Counts 12 through 14 allege that Mr. Treffinger placed two campaign workers on the county payroll when they actually were working exclusively for his 2000 U.S. Senate campaign. According to the indictment, the campaign workers performed virtually no work for the county; thus, they would not have been hired but for the 2000 U.S. Senate campaign. If there had been no 2000 U.S. Senate campaign, then there would be no Counts 12 through 14.<sup>6</sup>

Counts 15-18 allege that Mr. Treffinger directed his 2000 U.S. Senate campaign treasurer to file false reports with the FEC.<sup>7</sup> Specifically, the indictment alleges that Mr. Treffinger directed the campaign treasurer not to report the employment of the two campaign workers who are the subject of Counts 12 through 14. The filing of the FEC reports was only required because Mr. Treffinger was a federal candidate in 2000; but for Mr. Treffinger's federal candidacy, he would not have filed any of the FEC reports that gave rise to Counts 15 through 18. If there had been no 2000 U.S. Senate campaign, then there would be no Counts 15 through 18.<sup>8</sup>

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<sup>5</sup>The Government has agreed to dismiss Count 11 after sentencing.

<sup>6</sup>On May 30, 2003, Mr. Treffinger pleaded guilty to Count 14 and is scheduled to be sentenced on September 10, 2003. The Government has agreed to dismiss Counts 12 and 13 after sentencing.

<sup>7</sup>The Draft Advisory Opinion states that "[t]he Commission notes that the underlying filing obligations are obligations of the campaign committee and its treasurer under 2 U.S.C. 434, but are not obligations imposed on the candidates themselves." (Draft Advisory Opinion 2003-17 at 9) While this true statement of law is a helpful feature of Mr. Treffinger's defense to Counts 15-18, the indictment alleges that Mr. Treffinger himself directed his campaign treasurer to file false FEC reports.

<sup>8</sup>The Government has agreed to dismiss Counts 15 through 18 after sentencing.

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As our initial written request for an advisory opinion noted, Count 19 is the only count in the indictment that does not directly relate to Mr. Treffinger's federal campaigns and thus he is not seeking to use federal campaign funds to pay for the defense of this count.<sup>9</sup>

Count 20 alleges that Mr. Treffinger conspired to misrepresent the source of campaign activities conducted on behalf of his 2002 U.S. Senate campaign.<sup>10</sup> The Draft Advisory Opinion acknowledges that Count 20 "appears directly related to campaign activity." (Draft Advisory Opinion 2003-17 at 9)

Despite the above analysis, the Draft Advisory Opinion makes two fundamental errors: (1) It does not subject the counts in the indictment to the "irrespective test"; and (2) it minimizes the extent to which six of the 20 counts stem exclusively from Mr. Treffinger's 2000 and 2002 federal campaigns.

Applying the "irrespective test," the Commission cannot conclude that Mr. Treffinger would have been subject to the indictment "irrespective" of his federal candidacies. Indeed, Mr. Treffinger was only subject to 19 of 20 counts of the indictment because of his federal candidacies. Moreover, Mr. Treffinger would have been subject to 6 of the 20 counts "irrespective" of his county office, because Counts 4, 15 through 18 and 20 depend exclusively on Mr. Treffinger's status as a federal candidate.

Instead of applying the "irrespective test" in the *Legal Analysis and Conclusions* section, the Draft Advisory Opinion states in conclusory fashion that "the essence of the allegations is the defrauding of the county of its money and property, and a scheme to cover up such activity." (Draft Advisory Opinion 2003-17 at 7) This is not an application of the "irrespective test." Instead, it is another kind of test, that is, whether the allegations relate to Mr. Treffinger's county political office. Regardless of whether the allegations in the indictment relate to Mr. Treffinger's county political office, the allegations necessarily arise from Mr. Treffinger's federal political campaigns. Cf. Advisory Opinion 1998-1, 1998 WL 108618 \*4 (F.E.C.) ("any legal expense that relates directly to allegations arising from campaign . . . activity would qualify for 100% payment with campaign funds") (emphasis added)

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<sup>9</sup>The Government has agreed to dismiss Count 19 after sentencing.

<sup>10</sup>The Government has agreed to dismiss Count 20 after sentencing.

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Moreover, to the extent that the Draft Advisory Opinion states that "the essence of the allegations is the defrauding of the county of its money and property," it is factually wrong. On the contrary - as a reading of the indictment itself makes manifest - the essence of the allegations is that Mr. Treffinger obtained contributions and other forms of support for his 2000 and 2002 U.S. Senate campaigns by, among other things, defrauding of the county of its money and property.

Regardless of how one views the allegations, however, the Commission must apply the "irrespective test," as it has consistently done in other advisory opinions. Under the "irrespective test," Mr. Treffinger would not have incurred the legal expenses of defending himself "irrespective" of his federal candidacy. Factually, legally, and logically, the allegations against Mr. Treffinger arise only because he was a federal candidate in 2000 and 2002. Indeed, all but one of the counts in the indictment focus on Mr. Treffinger's status and conduct as a federal election candidate.

We have previously provided the Commission with a copy of the indictment and encourage the Commissioners to read it. Mr. Treffinger's status as a federal candidate forms the core of the indictment. If he had not been a federal candidate, then 19 of the 20 counts would not be possible. The word "campaign" in reference to Mr. Treffinger's 2000 and 2002 U.S. Senate campaigns appears no fewer than 69 times in the indictment and the word "candidate" in reference to both campaigns appears no fewer than 20 times. The following is a list of the counts and paragraphs in which Mr. Treffinger's federal campaigns are explicitly mentioned or directly referenced:

Counts 1-5:	¶¶ 2, 3, 5, 10, 11, 12, and 13
Count 6:	¶¶ 1 and 2
Count 7:	¶¶ 1, 2, 3, 4, 6, 9, 13, and 9 (under "Overt Acts")
Count 10:	¶ 1
Count 11:	¶¶ 1, 2, 3, 4, 6, 10, 12, 13, and 15
Counts 12-14:	¶¶ 1, 3, and 4
Counts 15-18:	¶¶ 1, 3, 4, 5, and 6
Count 20:	¶¶ 1, 2, 3, 4, and 5

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Finally, the Draft Advisory Opinion marginalizes to a footnote the fact that 6 of the 20 allegations exclusively arise from Mr. Treffinger's 2000 and 2002 federal campaigns. In footnote 7, the Draft Advisory Opinion states that only one count, Count 20, is "directly campaign-related." (Draft Advisory Opinion 2003-17 at 9 n.7) Thus, the Draft Advisory Opinion overlooks the express allegations in the Indictment that Counts 4, 15 through 18, and 20 are based on allegedly false FEC filings. That is, fully 30 percent of the indictment's allegations uniquely arise out of Mr. Treffinger's status as a federal candidate; 90 percent predominantly relate to Mr. Treffinger's status as a federal candidate and secondarily to his status as a county official; and only one of 20 allegations is based purely on his status as a county official.

#### CONCLUSION

We trust that our comments will be reviewed by the Commission and staff and respectfully request that the Draft Advisory Opinion be amended accordingly to permit the use of campaign funds to pay for legal expenses incurred by James W. Treffinger against allegations arising out of his 2000 and 2002 campaigns for U.S. Senate.

If you want any additional information, please do not hesitate to contact me.

Thank you for your consideration.

Very truly yours,

KLINGEMAN TURANO LLC



KARIN S. RIECKER

cc: Office of General Counsel, FEC (by fax 202-219-3923)